No. 80-1359

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In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE E. FLAGG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The sole question presented is whether the court of appeals correctly held that the Internal Revenue Service has the authority under Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), to issue a summons in aid of an investigation of a particular taxpayer when, in addition to a determination of the correctness of the taxpayer's federal income tax return, the information obtained is also used for statistical purposes by the Internal Revenue Service to measure taxpayer complaince.

The pertinent facts may be summarized as follows: Petitioner's federal income tax return for 1976 was selected for audit under the Internal Revenue Service's Taxpayer Compliance Measurement Program (TCMP). The TCMP is designed to measure and evaluate how taxpayers comply with the Internal Revenue Code reporting requirements. Under this program, a number of taxpayers are randomly

selected and their tax returns are examined to ascertain the correctness of the returns and to determine the taxpayer's tax liability. In addition to using the results of these audits in accordance with normal enforcement procedures, they are also used to improve the Internal Revenue Service's administration of the revenue laws and to identify statistically those returns which should be selected for audit. If an audit conducted under the TCMP indicates that the taxpayer has additional tax liability, appropriate procedures are instituted to collect the tax, or if the audit indicates an overpayment, refund is made, just as in any other case (Pet. App. A23-A26).

The summons here was issued to petitioner to obtain business records relating to his income and expenses for 1976 (Pet. App. A24). Petitioner refused to comply. The district court denied enforcement of the summons, holding that the Internal Revenue Service did not have the authority under Section 7602 to issue a summons to aid in an investigation when the return was selected for audit in connection with the TCMP (Pet. App. A2-A21).

The court of appeals reversed (Pet. App. A22-A40). It held that the Internal Revenue Service has the statutory authority to issue a summons in aid of an investigation as long as one of the purposes for the investigation is authorized by Section 7602. Because it is undisputed that one of the purposes for the investigation was to determine the correctness of petitioner's income tax liability, a purpose expressly authorized by Section 7602, the court concluded that the summons must be enforced, even though the results of the investigation would also be used for other tax enforcement purposes.

1. The court of appeals correctly held that the summons in this case was properly enforceable.

The Secretary of the Treasury and the Commissioner of Internal Revenue are charged with the responsibility of enforcing and administering the Internal Revenue Code. To this end, Section 7601 of the Code directs the Secretary to canvass and inquire after all persons who may be liable to pay any internal revenue tax. Section 7602 of the Code gives the Secretary the authority, consistent with the mandate in Section 7601, to issue a summons where necessary to ascertain the correctness of any return, to make a return where none has been filed, and to determine the internal revenue tax liability of any person. In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court held that the Internal Revenue Service has the authority to issue a summons if one of the purposes for the investigation is authorized under Section 7602, even though the information obtained by the use of a summons may subsequently prove useful in a criminal investigation. See also *United States* v. *Euge*, 444 U.S. 707, 711 (1980). Here, it is undisputed that the summons was issued to determine the correctness of petitioner's return. Only when the correctness of the return has been determined is the information obtained from the investigation useful in the Taxpayer Compliance Measurement Program (Pet. App. A25-A26). Accordingly, the court of appeals correctly ordered the summons enforced.

Contrary to petitioner's argument (Pet. 8-10), the random selection of returns under the Taxpayer Compliance Measurement Program does not exceed the IRS's express authority to administer and enforce the Internal Revenue Code (Section 7801 of the Code), and to inquire after all persons who may be liable to pay any internal revenue tax. Section 7601 of the Code. As the court of appeals noted (Pet. App. A26), "[t]he TCMP * * * aids the IRS in determining those areas of tax administration into which it should concentrate its limited enforcement resources. Both

the taxpayers and the IRS gain from the efficiencies resulting from the TCMP." Accordingly, there is no evidence to show, or even any reason to suggest, that returns randomly selected under the Taxpayer Compliance Measurement Program are selected for any improper purpose.

2. Petitioner further suggests (Pet. 15-19) that the decision below conflicts with *United States* v. *Humble Oil & Refining Co.*, 488 F. 2d 953 (5th Cir. 1974), vacated and remanded, 421 U.S. 943 (1975), aff'd per curiam, 518 F. 2d 747 (1975). There, the court declined to enforce an internal revenue summons to obtain information where "the primary purpose of the project was research" (518 F. 2d at 748) with respect to the level of taxpayer compliance with a particular Internal Revenue Service rule. See also *United States* v. *Bisceglia*, 420 U.S. 141, 151-152 (1975) (Blackmun, J., concurring). But the Fifth Circuit subsequently held in *United States* v. *First National Bank in Dallas*, 635 F. 2d 391 (1981), that the Internal Revenue Service has the authority under Section 7602 to issue a summons in the investigation of a return selected for audit under the Taxpayer Compliance Measurement Program. The court there expressly disavowed the interpretation of its previous holdings in *Humble Oil* advanced by petitioner in this case, holding "that information obtained pursuant to a summons issued under section 7602 may be used for research purposes if the summons is issued in aid of an investigation of the tax liabilities of a specific taxpayer * * *"[1] (635 F. 2d at 395). See also *United States* v. *Mercantile Trust Co.*, No. 80 Misc. 071 (E.D. Mo. Dec. 31, 1980) (summons issued to investigate a return selected for audit under the TCMP

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[1] *United States* v. *Bisceglia*, 420 U.S. 141 (1975), does not suggest a different result. This Court there ordered enforcement of a "John Doe" summons when it was determined that the Internal Revenue Service was investigating a party to a commercial transaction whose identity was unknown.

enforced); *United States v. Hallmark Carpet Mills*, CV 80-5474 MRP (TX) (C.D. Cal. Jan. 16, 1981), appeal pending, No. 81-5059 (9th Cir. (same).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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